structions that the plaintiff was entitled only to the proportionate amount of the rent of the telephone for the time its use was lost. So in *Jenkins v. Southern Bell Telegraph & Telephone Co.*[5] a verdict of thirty cents was sustained as not inadequate, on appeal by the plaintiff, where the defendant through a misunderstanding of a remark made by the plaintiff removed the phone from the plaintiff's house, there being no evidence of special damage. So also it has been held that exemplary or punitive damages cannot be awarded against a telephone company for removing a subscriber's telephone unless shown that the removal was an intentional wrong.[6]

The Court in the majority opinion confessed that they were "laboring under some doubt as to the correctness of their conclusions." There was no room here for exemplary damages, nor was the claim put on that ground, since the defendant's wrongful act was due to a mistake. The error in allowing the $250 as compensatory damages is not that damages are not recoverable for annoyance and inconvenience, for the weight of authority and even the dissenting opinion hold that they are so recoverable, but that the evidence in this case shows no appreciable annoyance and inconvenience caused by the disconnecting of the plaintiff's phone. What the decision really does, then, is to allow recovery for the annoyance caused by the rude manner of the defendant's agents. To establish such a doctrine as this would mean to open the door to damage suits for an infinite variety of intangible grievances and "insults" which have heretofore been considered of too small importance to be settled in a court of law.

E. C. L.

RIGHT TO TRIAL BY JURY IN WILL CASES UNDER THE PENNSYLVANIA CONSTITUTION.—The question as to the right to trial by jury in will cases under the Constitution of the State of Pennsylvania has been raised in that jurisdiction by a recent case, *Fleming's Estate*,[1] in which a vigorous dissenting opinion maintained that there is such a right, at least to determine whether the signature is true or forged.

In 1832, the Pennsylvania legislature provided that the court shall grant an issue for determination of the question by a jury "whenever a dispute upon a matter of fact arises before any register's [orphans'] court."[2] This statute has been interpreted by a long series of cases to mean "a substantial dispute upon a material

[5]7 Ga. App. 484, 67 S. E. 124 (1910).

[6]Cumberland Telephone & Telegraph Co. v. Baker, 85 Miss. 486, 37 So. 1012 (1904); Horsfield v. Missouri & Kansas Telephone Co., 101 Kan. 481, 168 Pac. 316 (1917).

[1]Fleming's Estate, 265 Pa. 399 (1919).

[2]Act March 15, 1832, Sec. 41, P. L. 146; 4 Purd. Dig. 4088. This act has been included with slight verbal changes in the codification of the Law of Decedents' Estates as Section 21 (b) of the Orphans' Court Act (Act June 7, 1917, P. L. 363).

matter of fact," and the method adopted for deciding whether the dispute is substantial is that the issue will be granted only when a verdict of the jury for the party demanding the issue would not be set aside as against the evidence.[3] In the recent case mentioned above[4] the Orphans' Court declined to grant an issue to the proponent of the will to determine the validity of the signature, because under the evidence a verdict that the signature was valid must be set aside. The refusal was affirmed by the Supreme Court, which held that the Act of 1832, even as interpreted, deprived no one of a constitutional right to a trial by jury. The question of its constitutionality seems not to have been raised in any of the many previous cases.

The first constitutional provision in Pennsylvania as to the right of trial by jury is contained in the Constitution of 1776 in Sec. 11 of Chapter I, the "Declaration of Rights,"—"That in controversies respecting property and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred," and in Sec. 25, Chapter II, "Plan or Frame of Government,"—"Trials shall be by jury as heretofore." The Constitution of 1790, Article IX, Sec. 6, provided that "Trial by jury shall be as heretofore, and the right thereof remain inviolate." The Supreme Court of the State has held that the effect of the provisions of these two Constitutions has been to preserve to the citizens the right of trial by jury wherever it existed under the law of England and of Pennsylvania prior to the Constitution of 1776.[5] The Constitutions of 1838 and 1874 contain the same clause as that of 1790. Thus there can be no constitutional right to trial by jury today in a will case, even to test the validity of the signature, unless that right existed before the adoption of the first State Constitution.

In England before the American Revolution all wills dealing with personalty ("testaments") were under the exclusive jurisdiction of the ecclesiastical courts.[6] The law courts had no jurisdiction whatsoever. Courts of Chancery in certain cases might take action in respect to the enforcement of such wills after probate, and might frame an issue for trial before a jury, but the verdict would not be binding upon the Chancellor.[7] Wills dealing with real property, on the other hand, were at first not probated

[3]Cozzen's Will, 61 Pa. 196 (1869); De Haven's Appeal, 75 Pa. 337 (1874); Schwilke's Appeal, 100 Pa. 628 (1882); Knauss' Appeal, 114 Pa. 10 (1886); Sharpless' Estate, 134 Pa. 250, 19 Atl. 630 (1890); Conway's Estate, 257 Pa. 314, 101 Atl. 652 (1917).

[4]Fleming's Estate, *supra*.

[5]Van Swartow v. Commonwealth, 24 Pa. 131 (1854); Byers v. Commonwealth, 42 Pa. 89 (1862); Smith v. Times Publishing Co., 178 Pa. 481, 521 (1897).

[6]Andrews v. Powys, 2 Bro. P. C. 504 (Eng. 1723); Bennet v. Vade, 2 Atk. 324 (Eng. 1742); Barnesly v. Powel, 1 Ves. Sen. 284 (Eng. 1749), in which the question of a forged signature was squarely raised.

[7]Barnesly v. Powel, *supra*.

at all. Later they were probated by the ecclesiastical courts, but the probate was not conclusive if the heir brought a common law action of ejectment to recover the lands.[8] Each devisee was required to make out his title in a new cause, establishing the will each time.[9] And even in a will devising lands, if the action was brought in equity, the granting of an issue *devisavit vel non* was a matter of discretion and not an absolute right.[10]

The probate law of the province of Pennsylvania differed but little from that of England. Registers had been provided to replace the ecclesiastical courts and to probate all wills, both of personalty and of realty.[11] By the Constitution of 1790 Register's Courts were established to hear appeals from probate.[12] These courts, whose jurisdiction was later given to the Orphans' Court,[13] exercised the powers of the old ecclesiastical courts in regard to appeals from probate. But the granting of an issue by the register prior to the first constitution was no more a matter of absolute right than in the ecclesiastical and equity courts of England, and no distinction seems to have been made in the probate between forgery or fraud of any character, just as no distinction was made in the ecclesiastical courts.[14] Probate of wills of personalty was conclusive except for a direct appeal.[15] But probated wills devising land were subject in the province as in England to be defeated in the collateral action of ejectment, where the probate was only *prima facie* evidence of the validity of the will.[16] This right to bring ejectment, though it allowed the heir to have a jury pass upon a will of realty, was in no sense a right to have granted on the probating of a will an issue as to its validity. It was rather a right to bring an entirely different action, and was abolished by the legislature in Pennsylvania in 1856.[17]

Although there has not been entire harmony in the decisions, due in part to different provincial statutes, it has been held in a majority of states that no absolute right to trial by jury in will cases existed prior to the adoption of the State Constitution.[18]

[8]Netter v. Brett, Cro. Car. 395 (Eng. 1638); Sir Richard Raine's case, 1 Ld. Raym. 262 (Eng. 1697).

[9]Netter v. Brett, *supra*.

[10]Hampden v. Hampden, 3 Bro. P. C. 551 (Eng. 1709); Woodruff v. Wood, Dick. 32 (Eng. 1719); Cowgill v. Rhodes, 33 Beav. 310 (Eng. 1863).

[11]Act 1700, 1 Sm. Laws, Chap. 43; Act. 1705, 1 Sm. Laws, Chap. 133; Act June 7, 1712, 1 Sm. Laws, Chap. 187; Rowland v. Evans, 6 Pa. 435 (1847).

[12]Art. V, Sec. 7, Constitution of 1790 and Act April 13, 1791, 1 Sm. Laws Chap. 1564. See notes 1 Sm. Laws, pages 36 and 137.

[13]Art V, Sec. 32, Constitution of 1874.

[14]McKean, J. at page 90 in Walmesley's Lessee v. Read, 1 Yeates 87 (Pa. 1791); Barnesly v. Powel, *supra*.

[15]Coates v, Hughes, 3 Binney 498, 506 (Pa. 1811); Logan v. Watt, 5 S. & R. 212 (Pa. 1819).

[16]Weston v. Stammers, 1 Dallas 2 (Pa. 1759); Walmesley's Lessee v. Read, *supra*, and case of Cook v. Brown cited therein by Justice Yeates; Smith v. Bonsall, 5 Rawle 80 (Pa. 1832).

[17]Act, April 22, 1856, Sec. 7, P. L. 533.

[18]Davis v. Davis, 123 Mass. 590 (1878); Moody v. Found, 208 Ill. 78, 69 N. E. 831 (1904); 15 Ann. Cas. 211, note.

In some states, however, the opposite conclusion has been reached,[19] while in others the right has been given by the Constitution itself or by Statute.[20]

An interesting point as to the constitutionality of the interpretation given to the Act of 1832 was not touched upon by the majority or by the dissenting justice in *Fleming's Estate, supra.* For even if there were a constitutional right to trial by jury to determine the validity of the signature to a will, as contended in the dissenting opinion, the refusal of the judge to allow the question to go to a jury when a verdict for one party must at once be set aside, would seem no more of an encroachment upon that right than would the giving of binding instructions or the granting of judgment *non obstante veredicto*, both of which are in common practice in Pennsylvania. It is true that the United States Supreme Court held in 1912 that the Pennsylvania act providing for granting judgment *n. o. v.* was opposed to the Seventh Amendment of the Federal Constitution, which guarantees "trial by jury as heretofore" in the Federal Courts, and held further that the practice must not be followed in the Federal Courts in Pennsylvania.[21] But the practice has been held constitutional in the Pennsylvania State Courts under the State Constitution, even after the United States Supreme Court's decision.[22] The reasons in favor of upholding that statute—simplification of procedure and elimination of waste motion—would apply just as strongly to the interpretation of the Act of 1832 on the question of granting an issue in will cases, even if there were such a constitutional right to trial by jury as the dissenting opinion contends.[23] For what useful purpose is served in forcing a matter to go to a jury if a verdict of the jury for him who demands the issue must necessarily be set aside?[24]

R. D.

NATURE OF THE SERVICES OF A FLAGMAN AT A CROSSING UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT.—The question as to whether or not an employee of a railroad is engaged in inter-

[19]Cockrill v. Cox, 65 Tex. 669 (1886); Corley v. McElmeel, 149 N. Y. 228, 237, 43 N. E. 628 (1896).

[20]Cases collected in note, 15 Ann. Cas. 212.

[21]Slocum v. N. Y. Life Ins. Co., 228 U. S. 364 (1912); Pedersen v. D. L. & W. R. R. Co., 229 U. S. 146 (1913).

[22]Dalmas v. Kemble, 215 Pa. 410 (1906); Stryker v. Montoursville Borough, 57 Pa. S. C. 100 (1914); American W. & V. Co. v. Fayette L. Co., 57 Pa. S. C. 608 (1914).

[23]See opinion of Justice Mitchell in Dalmas v. Kemble, *supra*, and dissenting opinion of Justice Hughes in Slocum v. N. Y. Life Ins. Co., *supra*, for a full discussion of the merits of granting judgment *non obstante veredicto.*

[24]Pennsylvania is at present in the throes of drafting a new constitution to replace that of 1874. The Committee appointed by Governor Sproul has drawn up for consideration a tentative draft, which repeats the former clause, "Trial by jury shall be as heretofore." The addition of a few sentences would settle several disputed questions and decisions, and especially would end the apparent conflict in constitutional interpretation of the same words between the United States and the Pennsylvania Supreme Courts.